United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-2405

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GERALD L. HERZFELD,
Plaintiff-Appellee,

—against—

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Defendant-Appellant.

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Third-Party
Plaintiff-Appellant-Appellee,

—against—

ALLEN & COMPANY, INCORPORATED and ALLEN & COMPANY,
Third-Party
Defendants-Appellants-Appellee,

ALLEN & COMPANY and ALLEN & COMPANY, INCORPORATED,
Third-Party
Counterclaimants-Appellants,

—against—

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Respondent-Appellee.
Third-Party Counterclaim

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF ALLEN AS APPELLANTS TO BRIEF OF LAVENTHOL AS APPELLEE

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—against—

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Laventhol, Krekstein, Horwath & Horwath,

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—against—

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Preliminary

This brief is submitted by third-party defendants and counterclaimants Allen & Company, Incorporated and Allen & Company (collectively "Allen") in reply to the brief of Laventhol, Krekstein, Horwath & Horwath, as third-party plaintiff-appellee and third-party counterclaim-respondent-appellee ("the Laventhol brief").

The Laventhol brief fails to discuss or to respond to any of the points raised by the main brief of Allen heretofore submitted to the Court. Laventhol does not dispute any of the facts and legal bases outlined by Allen in its main brief (at pp. 19-29) which demonstrate in detail that the District Court's finding that Allen participated in Laventhol's fraud was a clearly erroneous inference based on erroneous factual premises and contrary to the law. Laventhol offers no plausible explanation to support the result below requiring Allen to pay 85% of plaintiff's claim, which result conflicts with the law, with elemental justice, and with the District Court's finding that Laventhol and Allen were *equally* responsible.

Reply to Point I:

The law with respect to contribution.

1. *the federal securities laws*—in Point I, Laventhol seeks to argue a matter which is not at issue in this appeal, viz. whether a non-settling tortfeasor is or is not automatically barred under all circumstances from recover-

ing contribution from a settling tortfeasor under the federal securities laws (Br.* pp. 5-15). Allen has not contended and does not now contend that the mere fact of settlement by one defendant constitutes a bar to all claims for contribution asserted by another defendant.

Rather, Allen contends that the District Court, in computing the contribution to be awarded, improperly failed to credit Allen with the amount it had previously paid plaintiff in settlement, thereby causing a disproportionate burden (85%) of plaintiff's loss to fall upon Allen. Surely, permitting Laventhol to reap the windfall benefits of Allen's settlement cannot further the "deterrent" effect of contribution which underlies the decisions in *Globus* (318 F. Supp. at 957) and *deHaas* (286 F. Supp. at 815-16) upon which Laventhol's Point I is premised. **

2. *state law*—Laventhol also argues that Allen's settlement does not bar contribution under state law. This claim is also beside the mark, since the District Court did not award contribution with respect to any state law claims.

Laventhol does not and cannot dispute that, as of the date of the amended judgment herein, §15-108(b) of the New York General Obligations Law (as amended effective 9/1/74) operated to bar claims for contribution by a non-settling tortfeasor against a settling defendant. Laventhol

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* References to Laventhol's Appellee Brief will be cited herein as "Br. p. .....".

** Indeed, just as the defendant in *Globus* who had paid the plaintiff *after* judgment was entitled to a credit as against a non-paying defendant, at bar Allen, who paid plaintiff *before* the judgment, is entitled to a credit against the non-paying defendant Laventhol.

claims, however, that the relevant law is not the law prevailing on the date of judgment but the law prevailing on the date of Allen's settlement. Laventhol's claim is inconsistent with New York law.

Thus, in *Kelly* v. *Long Island Lighting Co.*, 31 N.Y. 2d 25, 59 (1972), the New York Court of Appeals applied retroactively the state rule with respect to contribution first enunciated in *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143 (1972).* It would be obviously inconsistent for the Courts to apply case law which grants the right to contribution on a retroactive basis, but then to apply a statute which limits the scope of such contribution prospectively only.

If, however, this Court were to refuse to apply §15-108 retroactively, then logic and equity would appear to require that the Court also refuse to apply the statute on which Laventhol relies (CPLR §1401) which also became effective as of September 1, 1974—in which case the pre-existing caselaw would apply. Under prior New York caselaw, no contribution was possible in a case based upon an *intentional* (as opposed to negligent) tort. See, e.g., *Goswami* v. *H.D. Construction Company*, 355 N.Y.S. 2d 926 (Sup. Ct., Steuben Co. 1975).

Thus, whatever view the Court takes as to the retroactivety of the New York statutes governing contribution, New York law simply would not permit contribution at bar. Either the statutes are retroactive and G.O.L. §15-108

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* Laventhol's citation of *Codling* v. *Paglia*, 38 A.D.2d 154 (3d Dept. 1972) aff'd 32 N.Y.2d 370 (1973) is inapposite. There the Court merely sought to avoid "undoing" a prior settlement. No such result would obtain at bar.

would render the release given Allen an absolute bar to contribution, or the statutes are not retroactive and the prior caselaw barring pre-judgment contribution in cases of intentional torts must be applied.

At the very least, even if there is a right of contribution against Allen, there must be a recognition of the right of Allen to an appropriate credit for monies already paid.

3. *the order of Judge Palmieri*—Laventhol finally attempts to bootstrap the order by Judge Palmieri which granted dismissal of the case as against Allen and which "set in motion the *procedural steps* whereby defendant Laventhol, if it is so advised, can bring third-party actions" (71a) into a claim of waiver by Allen of its right to contest the award of contribution.

The position now argued by Laventhol is logically fallacious. If Judge Palmieri had refused to allow Allen to settle and be dismissed from the case (as Laventhol then demanded) and Herzfeld had prevailed at the trial, Allen (as an allegedly equal wrongdoer) would have been liable for only one-half of Herzfeld's damages, or $255,000. Yet, now Laventhol seeks to have Allen pay 85% of those damages, or $423,500! Thus, Laventhol is in effect seeking to penalize Allen for having settled. Surely, Judge Palmieri (who was not privy to the amount Allen had paid in settlement) did not intend such a result when he preserved Laventhol's *procedural* rights. And surely Allen, in consenting to Judge Palmieri's order did not consent so to be penalized.

The issue presented here, i.e., the apportionment of liability for payment of plaintiff's claims, never arose before Judge Palmieri. Indeed, at the time of Allen's settlement

with plaintiff, plaintiff's claim was for $1,510,000, a figure which included a $1,000,000 punitive damage claim (40a). Moreover Laventhol was seeking not only contribution but full indemnity. Herzfeld's settlement with Allen was for $357,000. Thus, as of the date of Judge Palmieri's order, it was theoretically possible that plaintiff could recover judgment against Laventhol in an amount sufficiently large to require a further payment from Allen, even after giving Allen credit for its settlement.

Reply to Point II:

The facts regarding Allen's role in the transaction.

1. *what the District Court held*—Laventhol, without reference to any record citation, argues that the District Court "intended to tack onto Allen's liability an additional amount over and above any amount it paid at settlement" (Br. p. 20), and that it was "the [District] Court's conclusion that Allen should bear the brunt of Herzfeld's financial loss" (Br. p. 21), i.e. 85% by Allen and 15% by Laventhol. This is simply wrong.

These claims as to the District Court's "intention" and "conclusion" are expressly contradicted by the Court's opinion. The District Court expressly stated in its opinion that Allen and Laventhol were "*equally* culpable" and should be held "*equally* responsible." (231a) [emphasis supplied].*

* The District Court in amending its judgment, never considered the merits of Allen's post-trial motion, but rather held only that Allen has "waived its 'settlement' defense" (1124a). As shown in Allen's main brief (at pp. 30-36), this was incorrect.

2. *the allegedly culpable conduct of Allen*—Laventhol attempts to justify the District Court's findings with respect to the role of Lee Meyer (the sole basis for holding Allen liable) by simply quoting at length from the opinion of the District Court (Br. pp. 23-25). Allen has already shown that the quoted portion of the District Court's opinion is clearly erroneous and why (see Allen's main brief, pp. 19-29).

Several errors of fact and logic in Laventhol's brief discussion of Meyer's role warrant some discussion, however.

First, Laventhol argues that Meyer allegedly wanted to be sure that the profit was taken into the income statement *because* it was Meyer's mistaken understanding that "the transactions had actually occurred" (Br. p. 21). This misunderstanding cannot properly be used to infer guilty knowledge by Meyer. There is no evidence whatever that Meyer was aware that the transactions had *not* occurred; indeed, Lipkin and Chazen, the principal Laventhol partners involved, admitted that they had *confirmed* Meyer's (erroneous) impression that the Monterey-Continental Recreation transaction had already been completed (867a, 894a, 947a).

Laventhol also misstates the evidence (as did the District Court) with respect to the authorship of Richard Firestone's December 16, 1969 letter, which pointed out discrepancies between the audited and unaudited statements. As shown in Allen's main brief (pp. 25-29), there was no evidence that Meyer participated in any way in the writing of this letter; and indeed Mr. Feinberg, who was Firestone's attorney and the only disinterested major witness at the trial, testified that, *prior to* the commencement

of preparation of the December 16 letter, "Mr. Meyer, as I recall it . . . left . . ." (974a). The only apparent basis for the District Court's finding (222a, 223a) that Allen had participated in the drafting of the letter of December 16 was its clearly erroneous finding that Feinberg was Allen's attorney. Laventhol now concedes that Feinberg was not Allen's attorney (Br. p. 21).

Laventhol also erroneously claims (without reference to any record citation) that the December 16 letter "materially influenced the investment decisions of the purchasers—one of whom, of course, was Herzfeld . . ." (Br. pp. 22-23). This unsupported claim by Laventhol is belied by the testimony of Herzfeld himself, quoted at page 26 of Allen's main brief. When asked by Laventhol's counsel whether he had "accepted whole cloth the explanations given" in the December 16 letter, Herzfeld responded "absolutely not" (334a).

In any event, as is pointed out in Allen's main brief (p. 27), the December 16 letter, far from being misleading, actually highlighted the discrepancies between the audited Laventhol report and the unaudited report.

3. *Allen's counterclaims*—the District Court never reached the merits of Allen's counterclaims, but rather dismissed them on the ground that Allen was allegedly "*in pari delicto* with Laventhol" (236a-237a). If this Court concludes that Allen did not act *in pari delicto* with Laventhol, as Allen contends it should, then the basis for dismissing the counterclaims is removed.

Laventhol now argues, however, that even if Allen was not *in pari delicto,* Allen "failed to present a credible ac-

count of any assignment of claim." (Br. p. 27). Allen respectfully submits that Laventhol's claims with respect to credibility should not be determined in the first instance by an appellate court and that the matter should be remanded to the District Court for a new trial and factual findings with respect to the assignments.*

CONCLUSION

The portion of the judgment appealed from which awarded appellee Laventhol contribution against Allen in the amount of $76,500 should be reversed, and Laventhol's third-party complaint should be dismissed.

The portion of the judgment which dismissed the counterclaims against Laventhol should be reversed, and this cause should be remanded to the District Court for resolution of the counterclaims on the merits.

Respectfully submitted,

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* The issue relating to the validity of the assignments was extensively briefed below. The District Court made no findings on that issue. In the interest of brevity, Allen will not re-brief that issue here; Allen respectfully submits that remand to the District Court is the proper procedure for resolution of that issue in the first instance. If, however, this Court disagrees, Allen respectfully requests leave to file a supplemental brief regarding that issue.